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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1204

MORRIS SAYLOR, Doing Business as Bell Coach Lines,
Appellant,

vs.

STRAIGHT CREEK BUS, INC., ET AL.,
Appellees

JURISDICTIONAL STATEMENT

The appellant, Morris Saylor, doing business as Bell Coach Lines, having presented this day his petition for appeal now files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment or decree of the Court of Appeals of Kentucky in this action and should exercise such jurisdiction.

(a) The Statutory Provision Believed to Sustain the Jurisdiction

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment or decree in question by virtue of the express provisions of Section 237 of the Judicial Code (28 U. S. C. A., Section 344), which provides in part in subsection (a):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(b) The Statute of the State, the Validity of Which Was Attacked and Which Was Upheld by the Court of Appeals of Kentucky.

The State statute which was challenged by the appellant herein as being in conflict with a valid order of the Federal Office of Defense Transportation (General Order No. 21, Section 501.91) and which statute was declared to be valid by the Court of Appeals of Kentucky is Section 281.190(3) of the Kentucky Revised Statutes (Page 2105, Kentucky Revised Statutes, 1944). That section in so far as it is pertinent to this case provides:

"If any person holding a certificate over any public highway in this state between fixed termini or over a regular route fails to begin operation under the certificate on said line for a period of sixty days, * * * such certificate shall be and become null and void, and an order to that effect shall forthwith be entered on the records of the Division of Motor Transportation."

(c) The Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The opinion of the Court of Appeals of Kentucky reversing the judgment of the Franklin Circuit Court was delivered on December 8, 1944; on January 26, 1945 the petition for the rehearing of this case was overruled and on February 6, 1945 the opinion of the Court of Appeals of Kentucky was extended upon its face, at which time the judgment or decree sought to be reviewed became final.

The petition for appeal herein was presented and filed on March 22, 1945.

(d) Statement showing That the Nature of the Case and of the Rulings of the Court Are Such as to Bring the Case Within the Jurisdictional Provision Relied Upon.

This case involves the validity of Common Carrier Bus Certificate No. 316 issued by the Division of Motor Transportation of the Commonwealth of Kentucky to the appellant, Morris Saylor, doing business as Bell Coach Lines, on June 28, 1943, which authorized the appellant to operate a bus service from Pineville to Kettle Island and Crockett, all within the Commonwealth of Kentucky. This certificate was issued to the appellant under the provisions of Chapter 281 of the Kentucky Revised Statutes over the protest of the appellee, Straight Creek Bus, Inc., which company operated a bus line over the identical routes.

On August 31, 1943, the appellant had not commenced the operation of the bus line authorized by Certificate No. 316 and the appellee filed a petition before the Director of the Division of Motor Transportation requesting that said certificate be declared null and void for failure of the appellant to commence operation within sixty days as required by KRS 281.190 (3) above quoted. (R. 13-15).

The appellant filed a response (R. 19-21) and amended response (R. 22-24) to said petition of appellant in which the validity of KRS 281.190 (3) was questioned as being in conflict with Federal regulations issued by the Office of Defense Transportation and Rubber Conservation, which agencies were created pursuant to authority of the First War Powers Act (50 U. S. C. A. App. Sec. 601). The Office of Defense Transportation under its General Order No. 21, which order became effective November 15, 1942, and which

was issued under the authority of Executive Orders No. 8989 and No. 9156, provided in Section 501.91;

> "On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a certificate of war necessity issued by the Office of Defense Transportation governing such operation."

The appellant alleged that he had attempted to obtain Federal approval of his operation with due diligence but that due to inaction on the part of the Office of Defense Transportation he had been unable to obtain such approval within sixty days following the granting of the State Certificate No. 316 and that he was therefore excused from complying with the provisions of KRS 281.190 (3). The Director of the Division of Motor Transportation adjudged that the response and amended response of the appellant was insufficient; that KRS 281.190 (3) was in full force and effect and it was ordered that appellant's Certificate No. 316 be revoked. (R. 25-26).

From this decision the appellant appealed to the Franklin Circuit Court again challenging the validity of KRS 281.190 (3) as being in conflict with the regulations of the Office of Defense Transportation (R. 2-11). The Franklin Circuit Court after a hearing adjudged that where the holder of a State common carrier certificate was unable to obtain operating authority from the Federal Office of Defense Transportation under its regulations within sixty days following the issuance of the State certificate there existed a conflict between KRS 281.190 (3) and the Federal regulation and that the holder of the State certificate therefore was excused from complying with the State statute and it was accordingly ordered that Certificate No. 316 of the appellant be reinstated (R. 34-36).

An appeal was taken from this judgment to the Kentucky Court of Appeals, the highest State Court, where it was again contended by the appellant that there was a conflict between the Federal regulation and the State statute. The Court of Appeals by a six to one decision reversed the Franklin Circuit Court and adjudged that there was no conflict between the regulations of the Office of Defense Transportation and KRS 281.190(3). (See appended decisions).

The following statements were made by the Court of Appeals in the majority opinion:

> "At the time appellee was granted his Certificate there was in force general order No. 21 issued by the Director of the Office of Defense Transportation, a section of which provided:
>
> 'On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a certificate of war necessity issued by the Office of Defense Transportation governing such operation.'
>
> "Appellee relies on the inescapable fact that since the Federal Constitution is the supreme law of the land, a Federal enactment authorized by that instrument prevails over a state statute and suspends the operation of the latter when its enforcement would necessitate or sanction the performance of an act prohibited by the former. But obviously that rule of necessity has no application here since there is no conflict between the Federal order and the State statute. True, the Federal order requires that during war time the operator of a commercial vehicle, regardless of whether he holds a state permit, must obtain a federal certificate; but it cannot plausibly be said that such a requirement suspends a state statute which commands nothing to the contrary, but merely withdraws a privilege to operate in the event the beneficiary fails or is unable to avail himself of the privilege within a specified time."

The appellant throughout this controversy has admitted that he failed to comply with the provisions of KRS 281.190 (3), which requires the holder of a State common carrier certificate to begin operation of the bus service authorized by that certificate within sixty days after such certificate was granted by the State. The only contention which the appellant has asserted in defense of his failure to comply with this provision of the Kentucky Statutes was and is that he was required to obtain approval of the Office of Defense Transportation before he could commence this operation; that he had attempted in good faith and with due diligence to obtain this Federal approval; that such approval could not be obtained within the sixty day period and that the State statute requiring the holder of a bus certificate to begin operation within sixty days was therefore in conflict with the regulation of the O. D. T. requiring the holder of a bus certificate to obtain approval of the operation before the service could be inaugurated.

(e) Statement of the Grounds Upon Which It Is Contended That the Question Involved Is Substantial

The only question involved on this appeal and the only question which has been raised and passed upon in the State tribunals concerns the validity of KRS 281.190(3). This question is substantial. This question tests the authority of the Federal Government to control and regulate intrastate motor transportation during times of war.

In time of peace the various states had exclusive authority to regulate and control purely intrastate motor transportation. However, at the outset of the present war it became necessary for the Federal Government to exert its sovereign power to take control to some extent of all motor transportation within the United States. Limited supplies of tires, gasoline and equipment had to be con-

served in order that essential internal transportation in this country should not be disrupted.

Acting under the authority conferred upon him by the War Powers Act the President of the United States created the Office of Defense Transportation whose duty it was and is to carry out that policy of conservation. This Office of Defense Transportation required the owners of all commercial motor vehicles to obtain certificates of war necessity before those vehicles could be operated. This regulation applied not only to interstate operations but to exclusvely intrastate activities as well. The Federal Government by reason of the exigencies of war had in so far as intrastate motor transportation was concerned entered a field which formerly was within the exclusive regulatory powers of the states. Consequently, a person attempting to operate a motor transportation business in intrastate commerce was required to comply not only with the laws and regulations of the state controlling such operation but also with the Federal laws and regulations.

With this background we wish to discuss the situation with which the appellant was presented. In the early part of 1943, the appellant realizing that there was a need for additional bus service from Pineville, Kentucky to Kettle Island, Kentucky and Crockett, Kentucky to carry coal miners from their homes to work and return and realizing that such an operation would be a lucrative and profitable one, filed an application before the Division of Motor Transportation of the Commonwealth of Kentucky to obtain a common carrier bus certificate with a view to inaugurate an operation over these routes. Following a hearing before the Director of the Division of Motor Transportation the Director found that the public convenience and necessity required the inauguration of such a bus service and he accordingly granted the appellant a common carrier bus certificate on June 29, 1943. Having obtained this au-

thority it then became necessary for him to obtain approval of the operation from the Federal Office of Defense Transportation under General Order No. 21 of that agency. This the appellant immediately attempted to do. Due to the unusual volume of business before the Office of Defense Transportation at that time approval could not be obtained immediately despite numerous attempts by the appellee to speed such action. Being unable to obtain such approval the appellant was faced with the alternatives of:

(1) Inaugurating the bus service from Pineville to Kettle Island and Crockett without obtaining approval from the Office of Defense Transportation. This course would have subjected him to Federal criminal prosecution for a violation of the regulations of the Office of Defense Transportation and would have prejudiced his rights to obtain gasoline, tires and equipment for his other authorized operations.

(2) He could further prosecute his attempt to obtain approval from the Office of Defense Transportation and delay the commencement or inauguration of the bus service until such approval could be obtained. Following this course appellant would run afoul of KRS 281.190(3) which required him to commence operations under the common carrier bus certificate within sixty days after he had been granted by the Division of Motor Transportation upon pain of forfeiting his State license.

It was impossible for the appellant to comply with both the Federal regulation and with the State law and acting upon the belief that the Federal regulation was supreme and superseded the State statute he did not commence operations within sixty days. Upon his failure to comply with the State statute the Director of the Division of Motor Transportation acting under the authority of KRS 281.190 (3) revoked the common carrier certificate of the appellee and this litigation has ensued as a result. Appellant has

attempted throughout this litigation to prevent the cancellation of his common carrier bus certificate on the ground that the Federal regulation and State statute were in conflict and that according to the fundamental rule that where a State statute and a Federal law are in conflict the Federal law is supreme and the State statute is superseded to the extent of the conflict.

The majority opinion of the Court of Appeals of Kentucky in adjudging that the appellant's certificate should be revoked declared that no conflict existed between the State statute and the Federal regulation and consequently the State statute was valid and the Director of the Division of Motor Transportation was required under the provisions of that statute to revoke this certificate. As was pointed out above, this decision was not concurred in by the entire court and Judge Sims in a dissenting opinion points out that there actually was a conflict between the State Statute and the Federal regulation as they applied to the appellant. The appellant has been deprived of a valuable property right by the majority decision—he is deprived of this property by reason of his attempt to comply with a valid Federal regulation.

A case which supports our belief that the question involved is substantial is *Southern Railway Company* v. *Reid, et al.*, 222 U. S. 424, 32 S. Ct. 140 (1912). That case involved the validity of a statute of North Carolina which required transportation companies to receive freight for transportation whenever tendered at a proper shipping point. The statute provided that if a transportation company refused to accept such shipment the party tendering the freight could recover $50.00 per day plus all actual damages from the company. Reid had tendered to the Southern Railway Company in Charlotte, North Carolina certain freight for shipment in interstate commerce and offered to pay the charges thereon. The railway company

declined to receive the goods for shipment for five consecutive days. On the sixth day the freight was accepted for shipment and the charges were prepaid by Reid. In this action Reid attempted to recover from the railway company the penalties prescribed by the statute. The railway company defended on the ground that the State statute was in conflict with the Commerce Clause of the United States Constitution and the Interstate Commerce Act of the United States. The Interstate Commerce Commission under authority of the interstate commerce act required all carriers of passengers or property to fix and file for approval with the Commission the rates, fares and charges to be made. If a transportation company accepted goods for shipment when rates had not been established as prescribed it would be subject to criminal prosecution.

The railway company had not fixed or published rates from Charlotte, North Carolina to the destination to which Reid wished to ship his freight. Since no rate was established at the time Reid tendered his freight for shipment the company refused to accept it until a rate had been established. It was contended by the railway company that it was excused from complying with the State statute since it was required by the Federal regulation to have an established rate before it could accept goods for shipment.

The Supreme Court of the State of North Carolina held that there was no conflict between the State statute and the Interstate Commerce Act and they upheld the penalty against the railway company. Two judges dissented.

On appeal to the Supreme Court of the United States the decision of the Supreme Court of North Carolina was reversed. It was held that the Federal Government had taken possession of the field of regulation of interstate shipments and it was said:

> "The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the

statute requires him to do, and punishes disobedience by successive daily penalties.

"We cannot assume that it was without consideration of its necessity that Congress enacted §2 of the Hepburn act. It was no doubt the adaptation of experience to the exigencies of a practical problem,—Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor,—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: *If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground.* In so deciding we take no essential power from the states." (Underscoring ours.)

The similarity of the *Reid* case to the case at bar is so great that little comment need be made. In the *Reid* case, a state statute required a common carrier to do an act which it could not do until it had complied with a Federal regulation. Obviously, if the Southern Railway had published its rates for the route in question before Reid offered his freight for shipment (which it could have done) there would have been no conflict. But the fact that it was possible that the railway company might have avoided a conflict is immaterial.

The appellant might have obtained O. D. T. approval of his operation here involved within the sixty days required by the State statute, but he didn't, through no fault of his own. In each case, the carrier could not comply with the

state statute without running afoul of the Federal regulation, and vice versa.

In each case, the Federal regulation forbade the carrier to carry passengers in one case and freight in the other until Federal approval was obtained, while the state statute required the carrier to transport the passengers or freight without exception.

As was held in the *Reid* case, where the Federal statute or regulation fixes a prerequisite to the operation of the carrier, a state statute cannot require the carrier to operate before that Federal regulation is obeyed. This is precisely the situation raised by the case at bar.

(f) Statement Respecting Opinions

A copy of the majority opinion of the Court of Appeals of Kentucky is attached hereto as appendix "A"; and a copy of the dissenting opinion is attached hereto as appendix "B".

Respectfully submitted,

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APPENDIX "A"

COURT OF APPEALS OF KENTUCKY

STRAIGHT CREEK BUS, INC., *Appellant,*

vs.

MORRIS SAYLOR, et al. *Appellees*

Appeal from Franklin Circuit Court, William B. Ardery, Judge

Opinion of the Court by Justice Tilford—Reversing

On June 29, 1943, the appellee, Morris Saylor, doing business as Bell Coach Lines, was granted a Certificate of Convenience and Necessity to operate a bus line from Pineville to Crocket and Kettle Island, Kentucky, via Highways 21 and 221. He failed to begin operation under the Certificate within sixty days thereafter, and on August 31, 1943, the appellant, which had previously been granted a similar Certificate and hence had protested the granting of a Certificate to appellee, filed a written statement with the Director of the Division of Motor Transportation, calling attention to appellee's delinquency, and requesting that an order be entered declaring appellee's certificate null and void in accordance with the provisions of KRS 281.190, Subsection 3, which is as follows:

> "If any person holding a certificate over any public highway in this state between fixed termini or over a regular route fails to begin operation under the certificate on said line for a period of sixty days, or abandons operation thereunder, or fails to pay the renewal fees therefor for a period of thirty days after the due date thereof, or fails to keep the required insurance on file and in force, such certificate shall be and become null and void, and an order to that effect shall forthwith be entered on the records of the Division of Motor Transportation."

The Director notified appellee to appear and show cause why the Certificate should not be held null and void in accordance with the terms of the Statute; and during the course of the hearings held pursuant to that notice, appellee filed a response in which he set forth that immediately after the granting of the Certificate, he, in the name of his Company, "sought to obtain authority from the Office of Defense Transportation of the United States Government to commence operations and to inaugurate service but was advised by the Federal authorities charged with the responsibility of issuing gasoline and approving public transportation operations that it should not commence operations under this certificate until further notice from them, and in order to comply with the Federal regulations so as not to prejudice its right to obtain gasoline, tires, busses and replacements and in order to fully comply with the direction of Federal officials, it deferred placing said bus service into operations"; and further, that if appellant had not filed its statement requesting the entry of an order declaring the Certificate to be null and void, appellee "could and would have obtained permission from the Federal Government to inaugurate this service and would have placed the same in operation and would have fully complied with the rules and regulations of this department concerning insurance, payment of mileage tax, etc."

The Director adjudged the response insufficient and entered the requested order, whereupon appellee appealed to the Franklin Circuit Court, which, on January 28, 1944, entered a judgment setting aside the order of the Director and requiring him to reinstate the Certificate; and from that judgment the present appeal has been prosecuted by the holder of the previously granted Certificate.

At the time appellee was granted his Certificate there was in force general order No. 21 issued by the Director of the Office of Defense Transportation, a section of which provided:

> "On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a cer-

tificate of war necessity issued by the Office of Defense Transportation governing such operation."

Appellee relies on the inescapable fact that since the Federal Constitution is the supreme law of the land, a Federal enactment authorized by that instrument prevails over a state statute and suspends the operation of the latter when its enforcement would necessitate or sanction the performance of an act prohibited by the former. But obviously that rule of necessity has no application here since there is no conflict between the Federal order and the State statute. True, the Federal order requires that during war time the operator of a commercial vehicle, regardless of whether he holds a state permit, must obtain a federal Certificate; but it cannot plausibly be said that such a requirement suspends a state statute which commands nothing to the contrary, but merely withdraws a privilege to operate in the event the beneficiary fails or is unable to avail himself of the privilege within a specified time. As we see it, the sole question is whether in the exercise of our proper function we should read into a Legislative Act a provision wholly unauthorized by its text and foreign to its intent. If the Legislature had indicated that delay beyond sixty days in beginning operation under the Certificate might be excused if occasioned by unavoidable casualty, or, for that matter, by any circumstance or state of fact whatever, we could reasonably hold that such delay should be excused when occasioned by the necessity of complying with interfering war time regulations, although the Legislature had not foreseen their promulgation. Courts are not limited to the literal wording of an Act indicating what exceptions to its operations are permissible when any, by its terms or necessary intendment, are permissible. But where it is apparent that no exceptions were intended, we cannot properly create them. Here, assuming the Statutes to have been observed, the public demand for service caused the Certificate to be issued. The same demand dictated that if the service was not properly inaugurated, the opportunity to supply it should be opened to others who might be able to do so. The primary intent to benefit the public

is apparent in all of the Statutes regulating the granting and revocation of such certificates; and hence, the intent of the Legislature that there should be no exception to the operation of the provision here under consideration is likewise apparent. Moreover, even though it were material to the decision of the case, we could not say that no other company could have secured a Federal certificate within a period of sixty days merely because appellee was unable to do so.

We find no merit in appellees' contention that his constitutional rights were violated by the order of the Director voiding the Certificate of Convenience and Necessity formerly granted him.

It follows that the trial Court should not have disturbed the order of the Director of the Division of Tranportation; but this conclusion will not preclude appellee from applying for another Certificate of Convenience and Necessity, which, if granted, will remove the barrier he alleges now exists to prompt and favorable consideration of his application for a Federal permit. Whole Court Sitting.

APPENDIX "B"

COURT OF APPEALS OF KENTUCKY

STRAIGHT CREEK BUS, INC., *Appellant*,

vs.

MORRIS SAYLOR, et al., *Appellees*

Appeal from Franklin Circuit Court

Dissenting Opinion by Judge Sims

I cannot agree with the majority of the Court that order No. 21 issued by the Director of the Office of Defense Transportation (hereinafter referred to as ODT) is not in conflict with KRS 281.190. The federal order prohibits anyone who has obtained a certificate of convenience and necessity under our statute from operating a bus until a permit is

received from ODT. This federal order does not provide a time limit within which it will grant or refuse such permit after an application is made to ODT for it, and this fact brings it in conflict with KRS 281.190, subsec. 3, which automatically voids the state certificate if the holder fails to begin operations thereunder within 60 days after it is issued. If the operator obeys the state law, he runs afoul the federal law; and if he obeys the federal law, he runs afoul the state law. Of necessity this makes a conflict between the state and federal laws. *11 Am. Jur., Sec. 175, pp. 872, 873, Southern R. R. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140; State, ex rel. Atwood, 170 Wis. 218, 175 N. W. 589, 7 ALR 1617.* Such conflict would excuse appellee from complying with KRS 281.190, subsec. 3, *Conquegrano v. Clark Motor, 30 Atl. 859; Sutterland Statutory Const.* Sec. 2027. This conflict may be avoided by reading into our statute an exception that the 60-day limitation is not applicable until the ODT has issued its permit, which is permissible, as will be subsequently shown.

No criticism is hereby directed at ODT's order No. 21, as there is no doubt that it is a salutary and necessary war measure. But the Director of the Division of Motor Transportation of Kentucky should certainly not be required to cancel the state certificate when the federal permit is not issued within 60 days after the state certificate is issued. The purpose of KRS 281.190, subsec. 3, is to prevent delay on the part of an operator in making use of his certificate so that the public may receive the service to which it is entitled, but the majority opinion thwarts the statute and brings about the very thing the Legislature sought to prevent. Should the ODT grant its permit 61 days after the state issued a certificate, then under the ruling of the majority, the Director must cancel the certificate he issued and the public must wait while the would-be-operator goes to the expense and trouble of filing a new application upon which there must be a notice of at least 10 days before there can be a hearing. KRS 281.060. As a matter of practice the Director requires a 30-day notice.

Sight is not lost of the reasoning in the majority opinion that KRS 281.190 subsec. 3, contains no exception by the Legislature and the courts are without authority to read

an exception into the statute. It seems to me this is answered by the rule that it is proper to imply an exception in a statute in order to obviate a construction which would be unjust, oppressive, unreasonable or absurd, and one that the Legislature never intended to include. Surely, if the Legislature of Kentucky had foreseen that a federal permit would have to be obtained before the state certificate could be put into effect, and that there was no time limit within which ODT had to act, the law makers would not have required the certificate to be automatically cancelled if not put into operation within 60 days after it was issued. *50 Am. Jur., Sec. 433, p. 454; Church of the Holy Trinity v. U. S., 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511.*

The opinion of the majority will cause great confusion in Kentucky in issuing certificates of convenience and necessity and will practically nullify all future certificates issued by the state and will necessitate an applicant to first obtain a federal permit before incurring the trouble and expense of obtaining a useless and meaningless state certificate, all of which would be obviated by giving our statute a practical and common sense interpretation, and one which would carry out the intention of the Legislature. To further complicate the situation, it is not at all certain that ODT will grant a permit before the applicant first obtains a state certificate; and, then if ODT does not act within 60 days, the state certificate becomes void under KRS 281.190, subsec. 3.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1204

MORRIS SAYLOR, DOING BUSINESS AS BELL COACH LINES,
Appellant,

vs.

STRAIGHT CREEK BUS, INC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

LESLIE W. MORRIS,
MARION B. RIDER,
Counsel for Appellee,
Straight Creek Bus, Inc.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 1204

MORRIS SAYLOR, DOING BUSINESS AS BELL COACH LINES,
Appellant,

vs.

STRAIGHT CREEK BUS, INC., A CORPORATION, ET AL.,
Appellees.

STATEMENT ON BEHALF OF APPELLEE IN SUPPORT OF ITS MOTION TO DISMISS AND SHOWING THAT THE FEDERAL QUESTION UPON WHICH JURISDICTION IS PREDICATED IS NOT SUBSTANTIAL.

Jurisdiction is predicated upon Section 344(a) of Title 28, U. S. C. A., it being asserted that the Section 281.190(3) of the Kentucky Revised Statutes is in conflict with General Order No. 21 of the Office of Defense Transportation and therefore invalid.

Section 281.190(3), Kentucky Revised Statutes (which is a part of Chapter 281 of the Kentucky Revised Statutes dealing with the regulation of intra-state transportation of persons for hire by motor vehicle) provides as follows:

> "If any person holding a certificate over any public highway in this state between fixed termini or over a regular route fails to begin operation under the certificate on said line for a period of sixty days, • • •

such certificate shall be and become null and void, and an order to that effect shall forthwith be entered on the records of the Division of Motor Transportation."

Section 501.91 of General Order No. 21 of the Office of Defense Transportation, promulgated and adopted on November 15, 1942, provides as follows:

"On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a certificate of war necessity issued by the Office of Defense Transportation governing such operation."

On June 28, 1943, the Division of Motor Transportation of the Commonwealth of Kentucky issued to the appellant, Morris Saylor, doing business as Bell Coach Lines, a Certificate of Convenience and Necessity (under KRS, 281.090) authorizing an intra-state (between points in Bell County, Kentucky) bus operation (R. 12).

The appellant did not commence operation under such certificate within sixty days after its issuance (as required by KRS, 281,190(3), and the appellee, Straight Creek Bus, Inc., which was then operating under a certificate over the route, on August 31, 1943, filed a petition with the Director of the Division of Motor Transportation, calling to his attention the fact that appellant had not commenced operation within the time required by the statute, and requesting that the Director (as mandatorily required by the statute) cause to be entered upon the records of the Division of Motor Transportation an order "to the effect" that the certificate of the appellant had "become null and void" by reason of his failure to commence operation (R. 13). The Director of the Division of Motor Transportation on August 31, 1943, notified the appellant to appear, "and to show cause, if any he has, why its Common Carrier Certificate

No. 316 should not be declared null and void in accordance with the terms of the aforementioned statute" (R. 16). On December 1, 1943, the appellant filed a response in which he asserted, as excusing his failure to begin operation under the certificate, that his failure to begin operation was attributable to his inability to obtain from the Office of Defense Transportation a "Certificate of War Necessity" for the busses which he proposed to operate over the route (R. 19). The Director of the Division of Motor Transportation held the response of the appellant to be insufficient (R. 25). On December 6, 1943, the appellant filed an amended response, in which he again asserted, as excusing his failure to begin operation under the statute, that immediately after the issuance of the Certificate he made application and sought to obtain from "the Federal Government and its agencies" authorization for the use of motor transportation facilities, gasoline, etc. over the route but that prior to a ruling thereon the petition asking for a revocation of its certificate was filed with the Division, and consequently the Federal Agencies would not either approve or disapprove its application pending a decision by the Director of the validity of its certificate, and that his delay in commencing operation was the result of the necessity that he comply with the Federal Regulations before beginning operation (R. 22). The Director held the amended response to be insufficient, and on December 6, 1943, entered an order "on the records of the Division of Motor Transportation" declaring Certificate No. 316 to be null and void because of the failure of the appellant to begin operation for a period of sixty days from the date of its issuance (R. 25).

As you see, the appellant did not in either his original or amended response plead or otherwise contend that KRS 291.190(3) was in conflict with General Order No. 21 of the Office of Defense Transportation, and that as a consequence

of such conflict, the statute was suspended or otherwise rendered invalid. But, much to the contrary, it was his position that his inability to obtain from "federal agencies" the required authorization for the use of the necessary transportation equipment to enable him to begin operation excused his failure to begin operation under the certificate within sixty days after its issuance.*

The appellant prosecuted an appeal from the aforesaid order of the Director of the Division of Motor Transportation to the Circuit Court in and for Franklin County, Kentucky (KRS 281.410). Upon an appeal to the Circuit Court from an order of the Director, the statute provides the Court shall hear the case upon the certified record or abstract, and "shall dispose of the case in a summary manner, its review being limited to determining whether or not the division acted without or in excess of its powers, the order was procured by fraud, the order is in conformity with the provisions of this chapter, and the finding of facts in issue is supported by any substantial evidence" (KRS, 291.420). The appellant in his Petition on Appeal asserts that *the order of the Director was erroneous,* and assigns as error six (6) reasons, the substance and effect of all of which is that the Director acted without and in excess of his power in entering the order declaring the certificate to be null and void, for the reason the Director erred in not holding that the inability of the appellant to obtain the approval of the Office of Defense Transportation excused his failure to begin operation within the time required by the statute.

The appellant in his Petition on Appeal did not allege or otherwise rely upon any invalidity of KRS, 281.190(3),

* It is said in the Jurisdictional Statement of the appellant, at page 3 thereof, that "the validity of KRS, 281.190(3) was questioned as being in conflict with Federal Regulations issued by the Office of Defense Transportation" in the response and amended response filed by the appellant before the Director of the Divison of Motor Transportation. We challenge the correctness of such statement.

growing out of its conflict with General Order No. 21 of the Office of Defense Transportation, or otherwise.

The Franklin Circuit Court vacated the order of the Director, holding that the inability of the appellant to obtain the required consent from the Office of Defense Transportation excused his failure to begin operation, and that the property rights of the appellant "should not have been ordered forfeited by the Director of the Division of Motor Transportation in view of the fact that his delay in the commencement of the operation of busses under the certificate was occasioned by the intervention of war and the necessity of Federal approval being obtained" (R. 34).

The appellee prosecuted an appeal to the Court of Appeals of Kentucky from the judgment of the Franklin Circuit Court vacating the order of the Director of the Division of Motor Transportation (KRS, 281.420).

The appellant in the brief filed on his behalf in the Court of Appeals for the first time contended that there was a conflict between the state statute and federal regulation. Upon such appeal, the principal contention of the appellant was that his failure to begin operation was excused because he was not at fault since his inability to begin operation was attributable solely to his inablity to obtain the consent of the Office of Defense Transportation. The Court of Appeals of Kentucky rejected both contentions, and in so doing said:

> "• • • But obviously that rule of necessity has no application here since there is no conflict between the Federal order and the State statute. True, the Federal order requires that during war time the operator of a commercial vehicle, regardless of whether he holds a state permit, must obtain a federal Certificate; but it cannot plausibly be said that such a requirement suspends a state statute which commands nothing to the contrary, but merely withdraws a privilege to operate in the event the beneficiary fails or

is unable to avail himself of the privilege within a specified time. As we see it, the sole question is whether in the exercise of our proper function we should read into a Legislative Act a provision wholly unauthorized by its text and foreign to its intent. If the Legislature had indicated that delay beyond sixty days in beginning operation under the Certificate might be excused if occasioned by unavoidable casualty, or, for that matter, by any circumstance or state of fact whatever, we could reasonably hold that such delay should be excused when occasioned by the necessity of complying with interfering war time regulations, although the Legislature had not foreseen their promulgation. Courts are not limited to the literal wording of an Act indicating what exceptions to its operations are permissible when any, by its terms or necessary intendment, are permissible. But where it is apparent that no exceptions were intended, we cannot properly create them. Here, assuming the Statutes to have been observed, the public demand for service caused the Certificate to be issued. The same demand dictated that if the service was not properly inaugurated, the opportunity to supply it should be opened to others who might be able to do so. The primary intent to benefit the public is apparent in all of the Statutes regulating the granting and revocation of such certificates; and hence, the intent of the Legislature that there should be no exceptions to the operation of the provision here under consideration is likewise apparent. Moreover, even though it were material to the decision of the case, we could not say that no other company could have secured a Federal certificate within a period of sixty days merely because appellee was unable to do so."

Now, upon the idea that the decision of the Court of Appeals of Kentucky draws in question the validity of a state statute, on the ground of it being repugnant to the General Order No. 21 of the Office of Defense Transportation, it is sought to invoke jurisdiction. We do not question the

validity of General Order No. 21 of the Office of Defense Transportation. However, we do insist that the question involved is not substantial.

First. There is no conflict between the state statute and the federal regulation. They do not even deal with the same subject matter.

The state statute goes no further than to require that if one to whom a certificate authorizing a bus operation has been granted fails to begin operation within sixty days after the issuance of the certificate, such certificate "shall be and become null and void". It does no more than withdraw the privilege to operate if the holder of the certificate fails to begin operations. Such statute rests upon a sound basis. A certificate may be granted only upon a finding by the Director of the Division of Motor Transportation that the convenience and necessity of the public (to be served by the proposed route) requires such service (KRS, 291.090). If a certificate may be issued only when the convenience and necessity of the public is such as to require the proposed service, then the same convenience and necessity of the public would require that such service be made available to the public within a reasonable time. The Legislature determined sixty days to be a reasonable time.

Section 501.91 of General Order No. 21 of the Office of Defense Transportation goes no further than to provide that "on or after November 15, 1942, no person shall operate any commercial vehicle * * * unless there is in force with respect to such commercial vehicle a Certificate of War Necessity issued by the Office of Defense Transportation governing such operation." The language of the regulation is simple. The meaning of the regulation is plain. It means, just as stated therein, that no person shall operate any commercial vehicle for any purpose unless there is in force with respect to such vehicle a Certificate of War Neces-

sity. Such regulation, and its enforcement has contributed much to the war effort through the elimination of the unnecessary consumption of transportation equipment, gasoline, and tires.

The state statute does not require that the holder of a certificate do anything contrary to the requirement of the federal regulation. There is nothing in the state statute which is inconsistent with, or could conceivably interfere with the operation or enforcement of the federal regulation. It is only when the operation of a federal statute or regulation must be frustrated and its provisions be refused their proper effect, that a state law must yield and the federal statute or regulation be held to override or suspend it.

In *Savage* v. *Jones*, 225 US 501, the rule is thus stated:

> "* * * For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress, within the sphere of its delegated power."

In *Dickson* v. *Uhlmann*, 288 US 188, in holding that the Missouri Bucket Shop Law was not in conflict with or suspended by the Federal Grain Futures Act, the Court said:

> "* * * Since there is nothing in the state law which is inconsistent with, or could conceivably interfere with the operation and enforcement of, the federal law, the statute of Missouri was not suspended."

The state statute in no way interferes with the operation or enforcement of the federal regulation. It does not require that the holder begin operation; but, much to the contrary, merely withdraws, as the Court of Appeals pointed

out, "a privilege to operate in the event the beneficiary fails or is unable to avail himself of the privilege, within the accepted time."

The state statute involves an exercise by the state of its police power—the regulation of an intrastate bus operation, a subject over which Congress would have no jurisdiction, except in the exercise of its war powers. In *Cary* v. *State of South Dakota*, 250 US 118, it said that "• • • the intent to supersede the exercise by the state of its police powers is not to be implied unless the Act of Congress, fairly interpreted, is in actual conflict with the laws of the state."

In *Mauer* v. *Hamilton*, 309 US 598, it is further said:

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is expressly the case where the public safety and health are concerned."

There could exist, as we see it, no reasonable basis upon which it may be said that the Office of Defense Transportation in the promulgation and adoption of General Order No. 21 intended to take from the states their right to determine and control the terms and conditions upon which a grant of a privilege to conduct an intra-state bus line operation may be made. The federal regulation is applicable to all commercial vehicles—trucks, busses and otherwise. The regulation does not in any wise deal with the granting or revocation of certificates authorizing an intra-state bus operation. The state statute does not require that the holder begin operation within a specified time. In an effort to insure that there be made available to the public any service found to be necessary, the statute merely provides that the rights which a holder has under a certificate shall be and become null and void if the holder fails to begin operation

within the time specified—a withdrawal of the privilege granted.

General Order No. 21 of the Office of Defense Transportation had been promulgated and adopted, and was in full force and effect at the time, as well as for a considerable period of time prior to the issuance of the involved certificate to the appellant. We must assume that the appellant then knew that before he could begin operation under the certificate it would be necessary that he obtain a Certificate of War Necessity for the bus or busses to be used over the route, as well as otherwise comply with the requirements of the state statutes with respect to the payment of his "tag" tax (KRS, 281.520), the filing of a bond to secure the payment of mileage taxes (KRS, 281.080(3)), and the filing of the required public liability insurance bond (KRS, 281.080(1)). The certificate was issued upon condition that if he failed to begin operation within sixty days, the privilege conferred by it should expire. The statute contains no exceptions. The Court of Appeals of Kentucky has held that there were no exceptions, and that the holder of a certificate must begin operation within the required time, otherwise the privilege granted expires, irrespective of the reason why the holder failed to begin operation.

Second. The certificate was issued on June 29, 1943, to the appellant. The appellant filed his original response on December 1, 1943. A period of more than five months had elapsed between the date of the issuance of the certificate and the filing of the response. Yet, the appellant had not commenced operation on December 1, 1943. As excusing his failure to have done so, the appellant in his original response stated that immediately after the issuance of the certificate to him, he "sought to obtain authority from the Office of Defense Transportation of the United

States Government to commence operations and to inaugurate service but he was advised by the Federal officials charged with the responsibility of issuing gasoline and approving public transportation operations that it should not commence operations under this certificate until further notice from them, and in order to comply with the Federal regulations and so as not to prejudice the right to obtain gasoline, tires, busses and replacements and in order to fully comply with the directions of the Federal officials it deferred placing said bus service in operation" (R. 19). Such allegation is in effect an admission that the Office of Defense Transportation at the very outset refused to issue a Certificate of War Necessity authorizing the use of the transportation equipment necessary to conduct such operation. Now, notwithstanding his admitted inability to render the public service required by the certificate, the appellant seeks to retain the privileges conferred by the certificate.

The Franklin Circuit Court in its judgment required the Director of the Division of Motor Transportation to reinstate the certificate of the appellant, and "to certify to the Office of Defense Transportation and the Office of Rubber Conservation and any other Federal agency, to whom certification may be necessary, that such certificate is valid and in full force and effect and that it is authorized to conduct a common carrier bus operation over the route set out in said certificate" (R. 35). The certificate of the appellant was reinstated by the Director of the Division of Motor Transportation, in conformity with such judgment, on February 4, 1944. The appellee did not supersede or otherwise suspend the judgment of the Franklin Circuit Court pending the appeal to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky has stayed the enforcement of the judgment pending the disposition of this appeal (R. 84). Thus, as you see, the

certificate of the appellant has been in full force and effect since the 4th day of February, 1944—more than one year, and yet the appellant has not commenced operation. It is rather evident that the appellant is unable to obtain the required consent of the Office of Defense Transportation. Notwithstanding, the appellant has been able to retain, and now seeks to obtain the right to continue to retain the certificate without conducting any operation under it, thus depriving the public of the service and preventing the Director of the Division of Motor Transportation from issuing a certificate to another who might be able to inaugurate service.

The route authorized by the certificate passes through a thickly settled coal mining area. Coal mining is a most essential industry. If in fact there existed any real necessity for the operation authorized by the certificate, and if in fact the appellant in good faith ever intended to operate under it, in view of the great effort which the Office of Defense Transportation has made to make adequate transportation available to those engaged in essential industry, the alleged inability of the appellant to obtain the required approval of the Office of Defense Transportation is just a little difficult to understand.

Third. The appellant cites, and in the main relies upon the case of *Southern Railway Company* v. *Reid*, 222 U. S. 424. In that case the North Carolina statute was in direct conflict with, and if permitted to remain would interfere with and prevent an enforcement of the involved regulation of the Interstate Commerce Commission. We do not have such a situation in the case at bar.

It, thus, being shown that the involved state statute is not in conflict with, and does not interfere with the operation or enforcement of the federal regulation, it is thought

rather evident that the claim of the appellant that the state statute was suspended by the federal regulation is not substantial, and that the motion to dismiss the appeal should be sustained.

Respectfully submitted,

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MARION B. RIDER,
Attorneys for the Appellee,
Straight Creek Bus, Inc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1204

MORRIS SAYLOR, DOING BUSINESS AS BELL COACH LINES,
Appellant,

v.

STRAIGHT CREEK BUS, INC., A CORPORATION, ET AL.,
Appellees

MOTION TO DISMISS

The appellee, Straight Creek Bus, Inc., moves the Court to dismiss the appeal herein, for the reason that the federal question upon which jurisdiction is predicated is not substantial.

WHEREFORE, the appellee, Straight Creek Bus, Inc., prays that the appeal granted herein be dismissed.

LESLIE W. MORRIS,
MARION B. RIDER,
Attorneys for Appellee,
Straight Creek Bus, Inc.

No. 1204. SAYLOR, DOING BUSINESS AS BELL COACH LINES, *v.* STRAIGHT CREEK BUS, INC. ET AL. Appeal from the Court of Appeals of Kentucky. May 21, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Savage* v. *Jones,* 225 U. S. 501, 533; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749. *Mr. Samuel M. Rosenstein* for appellant. *Mr. Leslie W. Morris* for appellees. Reported below: 299 Ky. 309, 185 S. W. 2d 253.